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**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA**

In re

Case No. 10-33909-mkn

VENTO FAMILY TRUST,

## Chapter 11

**Debtor.**

**JOINT MOTION TO APPROVE  
STIPULATION FOR USE OF CASH  
COLLATERAL AND FOR ADEQUATE  
PROTECTION**

**Hearing Location:**

**United States Bankruptcy Court  
Foley Federal Building, Courtroom No. 2  
300 Las Vegas Blvd South, Third Floor  
Las Vegas, Nevada 89101**

BANK OF NEVADA, formerly known as BankWest of Nevada (“Bank” or “Lender”), by and through its undersigned attorneys and VENTO FAMILY TRUST (“Vento” or “Debtor”, and together with Bank, the “Parties”), by and through its undersigned attorneys, jointly move for the entry of an order approving the *Stipulation for Use of Cash Collateral and for Adequate Protection* attached hereto as Exhibit 1 (the “Stipulation”) pursuant to 11 U.S.C. §§ 363(c)(2) and 363(e) of the Bankruptcy Code, Rule 4001(b) of the Federal Rules of Bankruptcy Procedure and Rule 4001(b) of the Local Rules. The Bank has a security interest in certain income-producing real property owned by Debtor and pledged to the Bank as collateral securing two loans. The Bank also has a security interest in the income generated from the real property and this income constitutes its cash collateral.

This Joint Motion is based upon the following Memorandum of Points and Authorities, the Declaration in support of the Joint Motion (“Declaration”), filed concurrently herewith, all pleadings and papers of record, and any oral argument the Court may entertain.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

I.

## **JURISDICTION**

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and is a contested matter pursuant to Rule 9014 of the Federal Rules of Bankruptcy Procedure.

II.

## **RELEVANT FACTS AND BACKGROUND**

## A. The First Loan

1. On or about October 4, 2001, Debtor executed a "Promissory Note" (the "First Note") in favor of Bank, and its successors and assigns, through which Debtor promised to pay Bank the principal amount of \$580,000.00 "together with interest on the unpaid principal balance from October 4, 2001, until paid in full" (the "First Loan"). *See* First Note, attached as Exhibit 2.

2. On or about October 4, 2001, in connection with the First Note, Debtor entered into a "Business Loan Agreement" (the "Loan Agreement"). *See* Loan Agreement, attached as Exhibit 3.

3. On or about October 4, 2001, Debtor executed a "Deed of Trust" (the "First Deed of Trust") to secure the First Note. The First Deed of Trust was duly recorded with the Clark County Recorder on October 16, 2001, as Instrument No. 20011016-00081. *See* First Deed of Trust, attached as Exhibit 4.

4. The First Deed of Trust encumbers, among other things, the property commonly known as 2211 South Maryland Parkway, Las Vegas, Nevada 89104, APN 162-02-410-089, as further described in Exhibit A of the First Deed of Trust (the "Maryland Property").

1       5. On or about October 4, 2001, Debtor executed an “Assignment of Rents” (the  
 2       “Assignment of Rents”) to secure the First Note. The First Assignment of Rents encumbers the  
 3       First Property and was duly recorded with the Clark County Recorder on October 16, 2001, as  
 4       Instrument No. 20011016-00082. *See* First Assignment of Rents, attached as Exhibit 5.

5       6. On or about October 4, 2001, as additional security for the First Loan, Debtor  
 6       executed a “Commercial Security Agreement” (“First Security Agreement”) granting Bank a  
 7       blanket lien in all of Debtor’s assets. *See* First Security Agreement, attached as Exhibit 6.

8       7. On or about July 1, 2003, Debtor executed a “Change in Terms Agreement” (First  
 9       Loan Modification”) in connection with the First Loan. *See* First Loan Modification, attached as  
 10      Exhibit 7.

11      8. The First Note, Loan Agreement, First Deed of Trust, Assignment of Rents and  
 12      First Loan Modification are hereafter collectively referred to as the “First Loan Documents.”

13      **B. The Second Loan**

14      9. On or about February 28, 2002, Debtor executed a “Promissory Note” (the  
 15      “Second Note” and collectively with the First Note, the “Notes”) in favor of Bank, and its  
 16      successors and assigns, through which Debtor promised to pay Bank the principal amount of  
 17      \$1,265,000.00 “together with interest on the unpaid principal balance” (the “Second Loan” and  
 18      collectively with the First Loan, the “Loans”). *See* Second Note, attached as Exhibit 8.

19      10. On or about February 28, 2002, Debtor executed a “Construction Deed of Trust”  
 20      (the “Second Deed of Trust” and collectively with the First Deed of Trust, the “Deeds of Trust”)  
 21      to secure the Second Note. The Second Deed of Trust was duly recorded with the Clark County  
 22      Recorder on March 7, 2002, as Instrument No. 20020307-01726. *See* Second Deed of Trust,  
 23      attached as Exhibit 9.

24      11. The Deed of Trust encumbers, among other things, the property commonly known  
 25      as 191 South Arroyo Grande, Henderson, Nevada 89014, APN 178-21-702-002, as further  
 26      described in Exhibit A of the Second Deed of Trust (the “Arroyo Grande Property” and  
 27      collectively with the Maryland Property, the “Properties”).

1           12. Debtor executed multiple “Change in Terms Agreement[s]” (collectively, the  
 2           “Second Loan Modifications”) in connection with the Second Loan. *See* Second Loan  
 3           Modifications, attached as Exhibit 10.

4           13. Debtor executed multiple “Modification[s] of Deed of Trust” (collectively, the  
 5           “Second DOT Modifications”) in connection with the Second Loan. *See* Second DOT  
 6           Modifications, attached as Exhibit 11.

7           14. The Second Note, Second Deed of Trust, Second Loan Modifications and Second  
 8           DOT Modifications are hereafter collectively referred to as the “Second Loan Documents”  
 9           (collectively with the First Loan Documents, “Loan Documents”).

10           C. **Lender’s Security Interest in Income from the Properties**

11           15. Pursuant to the Loan Documents, Lender has a security interest not only in the  
 12           Maryland Property and Arroyo Grande Property, but in any income generated from the  
 13           Properties.

14           16. Pursuant to the Loan Documents, Lender was assigned all of Debtor’s “right, title,  
 15           and interest in and to all present and future leases of the [Properties] and all Rents from the  
 16           [Properties].” *See* Deeds of Trust, at p. 1; Assignment of Rents, at p. 1.

17           17. Lender properly perfected its security interest in its collateral by duly filing UCC  
 18           Financing Statements. *See* Financing Statements, attached as Exhibit 12.

19           18. By and through the Loan Documents and the UCC Financing Statements, Lender  
 20           has a first priority, properly perfected lien in, on and to, among other things, the Properties and  
 21           the income generated therefrom. That income constitutes Lender’s cash collateral.

22           D. **The Debtor’s Bankruptcy Case**

23           19. On or about December 27, 2010 (the “Petition Date”), Debtor filed its Chapter 11  
 24           bankruptcy petition.

25           20. Debtor failed to make its regular payments under the First Loan Documents for  
 26           January, February, and March of 2011.

27           21. Debtor is current on its payments under the Second Loan Documents.

22. Lender and Debtor have come to an agreement for Debtor's use of cash collateral and for adequate protection. *See Exhibit 1, Stipulation.*

III.

## **RELIEF REQUESTED**

The Parties respectfully requests the Court enter an order approving the Stipulation attached as Exhibit 1 for the use of cash collateral and for adequate protection pursuant to 11 U.S.C. §§ 363(c)(2) and 363(e).

IV.

## **ARGUMENT**

Lender has a first priority, properly perfected security interest in all of the collateral as described in the Loan Documents, including all of the income generated from the Maryland Property and the Arroyo Grande Property. Pursuant to 11 U.S.C. § 363(a), these funds constitute Lender's cash collateral. The Bankruptcy Code and Ninth Circuit case law both make it abundantly clear that it is the debtor's burden to prove adequate protection of a secured creditor's interest before the debtor can be allowed to use the secured creditor's cash collateral without its consent. *See, e.g., In re Scottsdale Medical Pavilion*, 159 B.R. 295, 302-303 (9th Cir. B.A.P. 1993). Section 363(c)(2) of the Bankruptcy Code provides, in pertinent part: “[t]he trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless- (A) each entity that has an interest in such cash collateral consents; or (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.” 11 U.S.C. § 363(c)(2).

Additionally, Section 363(e) of the Bankruptcy Code states that “on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.” 11 U.S.C. § 363(e). The requirement of adequate protection is mandatory and if adequate protection cannot be offered, such use, sale or lease of the collateral must be prohibited. *See 3-363 Collier on Bankruptcy* at ¶ 363.05[2] (15th Ed. Rev. 2009).

Here, Lender and Debtor have come to an agreement for the use of cash collateral and adequate protection. That agreement is memorialized in the Stipulation, attached as Exhibit 1. The Parties respectfully request that the Court enter the Order approving the Stipulation.

V.

## **CONCLUSION**

Pursuant to 11 U.S.C. § 363(c), the Parties have come to an agreement allowing Debtor's use of cash collateral and providing adequate protection to Lender. The Parties respectfully request that such Stipulation be approved, provided that no objection is filed.

DATED: May 31, 2011

SNELL & WILMER L.L.P.

DATED: May 6, 2011

TIMOTHY S. CORY & ASSOCIATES

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